STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CECIL D. PEOPLES,

Defendant-Appellant.

UNPUBLISHED
May 13, 2003

No. 234544
Oakland Circuit Court
LC No. 1996-146089-FC

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to deliver 225 or more but less than 650 grams of cocaine, MCL 750.157a and MCL 333.7401(2)(a)(ii). The trial court sentenced him to twenty to thirty years' imprisonment. Defendant appeals as of right. We affirm.

I. Identification Testimony

Defendant challenges the admission of Deputy George Ciofu's testimony that Lavinia Peoples, defendant's cousin, had identified defendant, presumably through a photograph. The admission of evidence is generally reviewed for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). Plaintiff offered Deputy Ciofu's testimony under MRE 804(b)(4), which provides that a statement concerning a fact of family history is admissible if the declarant is unavailable as a witness. Deputy Ciofu identified defendant in court as the person who Lavinia Peoples identified in a photograph as her cousin. Because this testimony concerned the identity of defendant, as well as defendant's family relation to Lavinia Peoples, it went beyond the scope of MCR 804(b)(4). Third-party testimony concerning an out-of-court statement of identification by the identifier/declarant is nonhearsay evidence and is admissible *if the identifier/declarant testifies in court and is subject to cross-examination*. MRE 801(d)(1)(C); *People v Malone*, 445 Mich 369, 384-385; 518 NW2d 418 (1994); *People v Sykes*, 229 Mich App 254, 266-267; 582 NW2d 197 (1998). Although Lavinia Peoples had testified before a grand jury and at the preliminary examination in this matter, she did not testify at trial.[1]

[1] Defendant did not cross-examine Lavinia Peoples at the preliminary examination.

Therefore, MRE 801(d)(1)(C) does not apply and Deputy Ciofu's testimony regarding Lavinia Peoples' identification of defendant was inadmissible hearsay.

Defendant argues that the error cannot be harmless as a matter of law because his right to confrontation was implicated because this evidence was admitted without providing defendant the opportunity to cross-examine Lavinia Peoples. Assuming defendant's constitutional rights were implicated by the admission of Deputy Ciofu's testimony, the trial court committed preserved nonstructural constitutional error. Preserved nonstructural constitutional error is reviewed to determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

We conclude that the error in admitting Deputy Ciofu's testimony was harmless beyond a reasonable doubt. Identity was not a principal issue at trial. Neither defendant nor his codefendants raised a defense of mistaken identification or alibi. In the preliminary examination transcript read to the jury, Lavina Peoples implicated her cousin, Cecil Peoples. Other evidence admitted at trial implicated Cecil Peoples. Defendant did not dispute the fact that his name was Cecil Peoples or that he was Lavina Peoples' cousin. Furthermore, the photos that Lavinia Peoples relied upon to identify defendant were introduced into evidence and the jury was in a position to determine for itself whether defendant was the person in the photos. Even without the testimony regarding Lavina Peoples' identification of defendant, there was sufficient evidence for the jury to infer that defendant was the "Cecil Peoples" referred to in the evidence. Identity of names is sufficient to raise a presumption of identity of person. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Under these circumstances, we conclude the prosecution has established that any error was harmless beyond a reasonable doubt.

II. Moten's Invocation of His Fifth Amendment Rights in the Jury's Presence

Defendant next argues that he was denied a fair trial when a prosecution witness, Duane Moten, invoked his Fifth Amendment privilege and refused to testify in the presence of the jury. The trial court denied defendant's motion for a mistrial on this basis. A trial court's decision to deny a motion for a mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). Michigan courts have recognized that there is a "danger that an adverse inference may be drawn from a claim of testimonial privilege." *People v Giacalone*, 399 Mich 642, 646; 250 NW2d 492 (1977).

> When an alleged accomplice invokes the privilege in the presence of the jury, prejudice arises from the human tendency to treat the claim of privilege as a confession of crime, creating an adverse inference which an accused is powerless to combat by cross-examination. [*Id.* at 645, quoting *State v Allen*, 224 NW2d 237, 241 (Iowa, 1974).]

A lawyer may not knowingly call a witness knowing that he will claim a valid privilege and refuse to testify. *Id*. at 645. This evidentiary prohibition is based on an ethical rule of conduct. *People v Gearns*, 457 Mich 170, 193, 197-198; 577 NW2d 422 (1998), overruled on other grounds *People v Lukity*, 460 Mich 484, 494; 596 NW2d 607 (1999). In determining whether an error occurred when an accomplice, codefendant, or intimately connected witness invoked the Fifth Amendment in the presence of the jury, we focus on the advance knowledge of the

prosecutor, the possible prejudice to the defendant, and whether the prosecutor acted in good faith. *Gearns, supra* at 198.

As a preliminary matter, we reject defendant's claim that his constitutional right of confrontation was violated. US Const, Am VI and Const 1963, art 1, § 20. Although a confrontation clause issue may arise when a witness asserts the Fifth Amendment, it does not arise where the witness did not give any substantive testimony. *Gearns, supra* at 186-187. "A defendant has no right to confront a witness who does not provide any evidence at trial. . . . A mere inference is simply insufficient for a Confrontation Clause violation." *Id.* at 187. Because Moten did not provide any substantive evidence at trial, defendant's right to confrontation was not violated.

We also conclude that Moten's invocation of his Fifth Amendment rights before the jury did not jeopardize defendant's right to a fair trial. The record indicates that the prosecution did not act in bad faith or have advance knowledge that Moten was going to invoke his Fifth Amendment rights. Moten had an agreement with the prosecution that he would testify in exchange for leniency. Although Moten indicated that he did not want to testify, he acknowledged that he did not tell the prosecution beforehand that he intended to assert the Fifth Amendment privilege. On the contrary, the record indicates that, approximately thirty minutes before the proceeding, Moten told the prosecutor that he was going to testify. He also told Deputy Ciofu, approximately ten minutes before he was called to testify, that he intended to testify despite the fact that he did not want to do so. Under these circumstances, we find neither bad faith nor advance knowledge by the prosecutor of Moten's intent to assert the Fifth Amendment.

Furthermore, we are not persuaded that defendant was unfairly prejudiced by Moten's invocation of the Fifth Amendment. The trial court offered a curative instruction that no adverse inference should be drawn from a witness' assertion of a testimonial privilege, but defendant declined the trial court's offer. Additionally, Moten's preliminary examination testimony was read into the record at trial, so the jury was not left to wonder what his testimony would have been.[2] Therefore, defendant was not denied a fair trial and the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

III. Admission of Preliminary Examination Testimony

Next, defendant argues that the preliminary examination testimony of Lavinia Peoples and Moten was erroneously admitted, thereby denying him his constitutional right to confront these witnesses. Defendant further argues that he should have been permitted to redact their testimony to remove prejudicial testimony to which he would have objected had he been present at the preliminary examination. The admission of evidence is generally reviewed for an abuse of discretion. *Jones, supra* at 706.

---

[2] The Confrontation Clause issue raised by the admission of the preliminary examination testimony of Lavinia Peoples is discussed, *infra*, in Part III of this opinion.

This issue was raised by defendant in a prior appeal to the Supreme Court, which rejected defendant's argument. *People v Meredith*, 459 Mich 62; 586 NW2d 538 (1998). In *Meredith*, the Supreme Court concluded that defendant had both the opportunity and motive to cross-examine Lavinia Peoples at her preliminary examination, but "specifically waived the right to do so." *Id.* at 67. The Supreme Court added that defendant "also had both the 'opportunity' and a 'similar motive' to develop [Lavinia Peoples'] testimony." *Id.* Under the law of the case doctrine, " 'an appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same.' " *People v Hermiz*, 235 Mich App 248, 254; 597 NW2d 218 (1999), aff'd 462 Mich 71 (2000), quoting *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996). Courts are likewise bound by a determination of a higher appellate court. *Hermiz, supra* at 254. The law of the case doctrine applies to "issues actually decided, either implicitly or explicitly, in the prior appeal. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). Because the Supreme Court explicitly decided the issue regarding the admissibility of Lavinia Peoples' preliminary examination as it relates to defendant, the Court's decision in *Meredith* is controlling as the law of the case.

The Supreme Court's decision in *Meredith* expressly addressed only the preliminary examination testimony of Lavinia Peoples, because she was the only witness who had indicated at that time that she was unwilling to testify at defendant's trial. It was not until defendant's later trial that Moten likewise refused to testify. Nonetheless, we conclude that the same result follows. Although the Court did not explicitly address the question of the admissibility of Moten's preliminary examination testimony in *Meredith*, its ruling was based in part on the conclusion that defendant had waived his right to cross-examine the preliminary examination witnesses. *Meredith, supra* at 67. When defendant waived his right to call and cross-examine witnesses in his own preliminary examination, he acknowledged that he could have had all of his codefendants' preliminary examination witnesses brought into court and stipulated that the witnesses at the codefendants' preliminary examination would have given the same testimony. Moten testified at the same preliminary examination as Lavinia Peoples and defendant had the same opportunity and motive to develop the testimony of both witnesses. Therefore, the Court's ruling in *Meredith* implicitly decided the question of the admissibility of Moten's preliminary examination testimony. Following *Meredith*, we conclude that Moten's preliminary examination testimony was admissible in defendant's trial.

Furthermore, defendant was not entitled to redact information that he could have objected to previously if he had elected to cross-examine the witnesses at the preliminary examination. Defendant waived his right to do so when he expressly waived his opportunity for cross-examination. *Meredith, supra* at 67. Thus, the trial court did not abuse its discretion in admitting the preliminary examination testimony of Lavinia Peoples and Moten or in refusing to allow defendant to redact this testimony.

IV. Exclusion of Grand Jury Testimony

Next, defendant argues that the trial court erred by denying his motion to admit the grand jury testimony of Lavinia Peoples and Moten. We disagree. The trial court's decision whether to admit evidence is generally reviewed for an abuse of discretion. *Jones, supra* at 706. However, to the extent this issue implicates defendant's constitutional right to confrontation, it is reviewed de novo. *People v Rodriguez*, 251 Mich App 10, 25; 650 NW2d 96 (2002). Defendant

preserved this issue with respect to Lavinia Peoples' grand jury testimony, so any denial of defendant's right to confrontation from the exclusion of this testimony does not require reversal unless the error was harmless beyond a reasonable doubt. *Carines, supra* at 774. However, defendant did not preserve this issue with respect to Moten's grand jury testimony, so he must show that the exclusion of this testimony was plain error that affected substantial rights. *Id.*

Defendant argues that the grand jury testimony of Lavinia Peoples and Moten should have been admitted under MRE 804(b)(1).[3] Assuming, without deciding, that the grand jury testimony of Lavinia Peoples should have been admitted, we conclude that such error was harmless beyond a reasonable doubt. In determining whether a constitutional error is harmless beyond a reasonable doubt, "[t]he factors to consider include 'the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case.' " *People v Watson*, 245 Mich App 572, 585; 629 NW2d 411, quoting *People v Kelly*, 231 Mich App 627, 644-645; 588 NW2d 480 (1998). Defendant offered Lavinia Peoples' grand jury testimony for the purpose of attacking her credibility. However, Lavinia Peoples' preliminary examination testimony was read to the jury and in this testimony, her credibility was extensively impeached by codefendants' attorneys, who had the same motive as defendant for cross-examining her. This included testimony that she lied to the grand jury, lied to police, and had a criminal record. Admission of the grand jury testimony to show that Lavinia Peoples lied was not integral to defendant's case in light of her admission in her preliminary examination testimony that she lied to the grand jury and police and the fact that there was other impeachment evidence against her. This testimony was essentially cumulative for the purpose for which defendant sought to introduce it. Therefore, we conclude that the trial court's alleged error in excluding Lavinia Peoples' grand jury testimony was harmless beyond a reasonable doubt.

We further conclude that defendant has failed to show that the failure to admit Moten's grand jury testimony was plain error that affected substantial rights. Defendant does not explain the nature of Moten's grand jury testimony or how this testimony would have affected the outcome of the case. Because there is no indication that substantial rights of defendant were affected, we decline to reverse defendant's conviction on the grounds that Moten's grand jury testimony was not admitted at trial.

V. Sentencing

Finally, defendant argues that he is entitled to resentencing because the trial court did not score the sentencing guidelines in determining his sentence. We disagree. Because defendant committed the offense before January 1, 1999, the statutory guidelines do not apply. MCL 769.34(2); *People v Davis*, 250 Mich App 357, 370; 649 NW2d 94 (2002). Furthermore, as

---

[3] MRE 804(b)(1) provides that the following former testimony is admissible when the declarant is unavailable as a witness: "Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

defendant concedes, the former judicial guidelines were not applicable to defendant's conviction because the offense was subject to a mandatory minimum sentence, MCL 333.7401(2)(a)(ii). Defendant received a sentence prescribed by MCL 333.7401(2)(a)(ii), and a legislatively mandated sentence is presumptively proportionate. *Davis, supra* at 369. Thus, defendant is not entitled to resentencing.

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra